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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 55

CESARO SGRO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1932

CERTIORARI GRANTED MAY 31, 1932

(36,734)

(36,734)

SUPREME COURT OF THE UNITED STATES

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[fols. a & 1]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. —

CESARO SGRO, Plaintiff in Error,

against

UNITED STATES OF AMERICA, Defendant in Error

NOTICE THAT PRÆCIPE HAS BEEN FILED

To the Hon. Oliver D. Burden, attorney for defendant in error.

SIR: Please take notice that on the 5th day of February, 1927, the undersigned filed with the Clerk of the Court a præcipe for the record to be transmitted to the United States Circuit Court of Appeals, Second Circuit, on the Writ of Error sued out in the above cause, and notice of which præcipe is herewith served on you.

Dated this 5th day of February, 1927.

I. K. Baxter, Attorney for Plaintiff in Error. Office and Postoffice address: 66 Genesee Street, Utica, N. Y.

[fol. 2] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE THAT BILL OF EXCEPTIONS WILL BE PRESENTED

To the Hon. Oliver D. Burden, attorney for defendant in error.

SIR: You will please take notice that the annexed Bill of Exceptions herein will be presented to the Honorable Frank Cooper, United States District Court Judge, in and for the Northern District of New York, at the Court House, in the City of Albany, N. Y., on the 14th day of February, 1927, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for settlement and al-

lowance as a part of the record in the above entitled cause, [fol. 3] upon the Writ of Error sued out herein by the Plaintiff-in-Error.

Dated February 10th, 1927.

I. K. Baxter, Attorney for Plaintiff in Error. Office and Postoffice address: 66 Genesee Street, Utica, N. Y.

In District Court of the United States for the Northern District of New York, at the Utica Term, in the Year 1926

Information

First Count

Be it remembered that Oliver D. Burden, Attorney of the United States for the Northern District of New York, who for the United States in this behalf prosecutes, in his own person comes here into the District Court of the United States for said District and division, on this 6th day of December, in this same term, leave of court first being had and obtained, and for the United States gives the court here to understand and be informed, that as shown by the sworn affidavit of Charles Dodd hereto annexed, Cesaro Sgro, Bouckville, N. Y., on August 2, 1926, at Bouckville Hotel, Bouckville, N. Y., aforesaid, in said district and division, as a first offense of that kind on his part unlawfully did possess a large quantity, to wit, 3½ bbl. beer, 1 [fol. 4] pt. gin, of intoxicating liquor, to wit, as otherwise than as authorized in the National Prohibition Act, that is to say for intoxicating beverage purposes; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Second Count

And said Attorney of the United States, who prosecutes as aforesaid, for the United States further gives the court here to understand and be informed, that said Cesaro Sgro on June 29, 1926, at Bouckville Hotel, Bouckville, N. Y., aforesaid in said district and division, as a first offense

of that kind on his part, unlawfully did knowingly sell, to Agent Dodd for intoxicating beverage purposes, certain intoxicating liquor, to wit, 1 glass of beer then and there contained in —, and that he, the said defendant, then and there well knew the same to be such intoxicating liquor against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Whereupon said Attorney of the United States, who prosecutes as aforesaid, for the United States prays the consideration of the court here in the premises, and that due process of law may be awarded against said defendant in this behalf to make his answer to said United States concerning the premises aforesaid.

Oliver D. Burden, United States Attorney.

[fol. 5] IN UNITED STATES DISTRICT COURT

COMPLAINT OR AFFIDAVIT UPON WHICH SEARCH WARRANT WAS ISSUED

UNITED STATES OF AMERICA,
Northern District of New York, ss:

Be it remembered that on this date before me, W. M. Arthur, a United States Commissioner for the Northern District of New York, came Chas. G. Dodd, a United States Internal Revenue Agent, detailed to act as Prohibition Enforcement Agent, who, being by me duly sworn, deposes and says:

That he believes the laws of the United States, viz.: The National Prohibition Act, are being violated by reason of the facts, to wit: that intoxicating liquors, containing more than one-half of one per cent of alcohol by volume, are being unlawfully possessed for the purpose of sale and distribution, at the premises known as a 2½-story frame hotel on northerly side of main highway leading from Pine Woods to Madison. Said hotel in Bouckville, N. Y., owned and operated by John Doe in said Village of Bouckville, N. Y., and District as aforesaid.

That the grounds of this application and the sources of deponent's said belief are the following facts and circum-

stances: That on June 29, 1926, deponent personally purchased of a person in charge at said premises, a drink of intoxicating liquor, to wit: beer, containing more than one-
[fol. 6] half of one per cent. of alcohol by volume, for the sum of $.10. That deponent tested the said beer which he took with him and same was found to contain 4.85% of alcohol by volume.

That from the foregoing, deponent has reason to believe and does believe that intoxicating liquors are being possessed on said premises for the purpose of unlawful sale and distribution contrary to the provisions of the National Prohibition Act and against the peace and dignity of the United States of America.

Charles G. Dodd.

Sworn to before me and subscribed in my presence this 6th day of July, 1926. W. M. Arthur, U. S. Commissioner as Aforesaid.

This cause coming on for hearing on the application for a search warrant, supported by the affidavit above set forth, the undersigned Commissioner thereupon being satisfied that there is probable cause to believe that the grounds set forth in the application and affidavit do exist, and that the law is being violated as charged, does hereby so find.

W. M. Arthur, U. S. Commissioner as Aforesaid.

[fol. 7] IN UNITED STATES DISTRICT COURT

William M. Arthur, United States Commissioner, 103 W. Dominick Street, Rome, N. Y.

UNITED STATES

vs.

JOHN DOE

Viol. Nat. Pro. Act, Hotel Bouckville, N. Y., June 29, 1926

CERTIFICATE OF U. S. COMMISSIONER

Dec. 20th, 1926.

I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above entitled matter, was made before me on the 6th day of July, 1926.

That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or redated, and my docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver.

W. M. Arthur, U. S. Commissioner.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[fol. 8] Notice that bill of exceptions will be presented, omitted; printed side page 2 ante.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF EXCEPTIONS

Be it remembered that the preliminary motions of the defendant in the above entitled cause came on for hearing and decision on the 21st day of December, 1926, being one of the days of the December term of the said Court, before the Honorable Frank Cooper, Judge of said Court.

Oliver D. Burden, Esq., Appeared as Attorney for the Government.

Floyd S. Spangle, Esq., of counsel.

I. K. Baxter, Esq., Appeared as Attorney for the Defendant.

[fol. 10] The defendant moved on verified motion papers to restrain the use of evidence unlawfully obtained by Federal Prohibition Agent B. G. Silvernail and others in the purported execution of a search warrant issued by William M. Arthur, United States Commissioner at Rome, N. Y., on the 6th day of July, 1926; and alleged that said Federal Agents under color of authority of said warrant, on the 2nd day of August, 1926, searched defendant's hotel on Main Street at Bouckville, N. Y., and claimed to have

seized therefrom "I pint gin, 3½ bbls. beer," on the following grounds:

First

That the search warrant was dated and issued on the 6th day of July, 1926. That it was not "executed and returned to the Judge or Commissioner who issued it within 10 days after its date," and that "after the expiration of this time the warrant, unless executed, is void."

The defendant offered in support of this point the certificate of the United States Commissioner who issued the warrant showing that the complaint or affidavit upon which the search warrant was issued was made before him on the 6th day of July, 1926. That the search warrant was issued on "said 6th day of July, 1926, but was not executed within the 10 days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent-in-charge of the Syracuse office, requesting that same be reissued or redated, and my Docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver." [fol. 11] The Court overruled and denied the motion on this first ground and stated:

"I hold that within a reasonable time after the date of the offence alleged, after the date of the probable cause is brought to the attention of the commissioner, he may issue a search warrant and if ten days has elapsed without its execution, he may change the date and thereby extend that search warrant or he may issue a new one. He has power to do both. It matters not which way he does it." To which ruling of the Court the defendant duly excepted.

Second

That said search warrant was illegal and invalid, having been issued without probable cause, solely upon the affidavit of Charles G. Dodd which merely alleged that he had reason to believe that there was intoxicating liquor unlawfully possessed at defendant's said hotel and that the grounds of the application and source of his belief are "that on the 29th day of June he purchased of a person in charge at said premises a drink of intoxicating liquor, to wit: beer containing more than half of one per cent of alcohol by volume for the sum of ten cents" and that he "tested said beer which he took with him and same was

found to contain 4.85 per cent of alcohol." Defendant urged that there were no facts stated in said affidavit to constitute probable cause, that the only facts alleged in [fol. 12] said affidavit were that he purchased a drink of beer for the sum of ten cents to which are added the opinions and conclusions of the affiant that it was intoxicating liquor, that it contained more than one-half of one per cent of alcohol by volume; that he tested said beer and that it was found to contain 4.85 per cent of alcohol by volume. That such alleged opinions and conclusions of the affiant were at most mere opinion evidence or attempted expert testimony which the affiant was not shown qualified to give, there being not even a single fact alleged in said affidavit which tended to show any experience, knowledge or other qualification of the affiant as an expert. That the alleged conclusion in said affidavit that intoxicating liquor was possessed or had been sold at defendant's premises was controverted and denied and that under the language of statute it therefore became the duty of the Judge or Commissioner to call witnesses and take evidence as to the controverted grounds upon which the search warrant purported to have been issued.

"The Court: You are making the contention now that because the statute speaks of controverting a search warrant that you may have a preliminary investigation under the title of controversy of the search warrant to determine whether or not it actually was alcoholic liquid which the affiant purchased?

Mr. Baxter: That is my understanding and the language of the statute."

[fol. 13] The defendant further urged that even if the affidavit upon which the search warrant purports to have been issued had stated sufficient facts to constitute probable cause for issuing a search warrant that the existence of such facts on the 29th day of June, 1926, did not constitute probable cause for issuing a search warrant to search defendant's premises on the 2nd day of August, 1926, because the time was too remote.

Third

That the search and seizure by said Federal officers at defendant's premises on the 2nd day of August, 1926,

under color of authority of said search warrant were illegal, invalid and mere wanton trespass on the part of said Federal officers; because instead of following the mandate and direction of the search warrant, they seized and wantonly destroyed three and one-half barrels of lawful cereal beverage, which was properly marked and labelled cereal beverage, containing less than one-half of one per cent of alcohol by volume. That upon committing such wanton trespass, and unlawful and wilful destruction of property, said Federal officers became trespassers ab initio.

"The Court (interrupting): Does that render invalid evidence of the seizure and the offering in evidence of the things seized under that search warrant?

Mr. Baxter: Yes, sir; it makes every act of these supposed officers, when they once desert their official attitude and become trespassers and wanton trespassers and de-
[fol. 14] stroyers of property, it makes every act that they do on that occasion a trespass.

The Court: That is something you hope to write into the laws of this country, which has not yet been written in.

Mr. Baxter: No sir; there are decisions of the United States Court which holds that directly.

The Court: You have reference to some decisions, and I doubt if any are in the United States Court, about trespassers ab initio. If you have a decision of the Supreme Court which holds that a federal officer executing a search warrant, who, outside of the scope of his authority, while legally and lawfully executing the mandate of the search warrant, not going beyond its provisions in any way so far as the seizure of the property described in the mandate is concerned, but unofficially, outside of the scope of his duties, destroys some other property, if you can show any authority that the destruction of that property not described in the search warrant, wanton destruction, if you please, which would render the officer liable in his personal right, not only civilly for the damages which he caused, but possibly criminally, that that invalidates a lawful search warrant, lawfully issued and lawfully executed, I would like to see that case.

Mr. Baxter: I do not claim it invalidates the search warrant. I claim it invalidates the attempted execution. That is the decision I have in mind.

The Court: What do you mean by "invalidates the attempted execution?"

Mr. Baxter: It shows that the officer was not there law- [fol. 15] fully executing the search warrant as he purported to be when he first came in and served a copy; it shows he was there as a trespasser, not with the thought in his mind of carrying out the order or direction of the court and confining himself to the authority therefor, but he high-handedly takes the matter in his own hands; and if that had been intoxicating liquor, and I suppose they will claim in their opinion it was, there is not any authority, no right in or duty on them, no power in any place outside of this court, to destroy the property. This property was wantonly destroyed. We are not able to show what it was now because these agents ruthlessly went in there and usurped the province of the court and jury and acting like——

The Court (interrupting): If you are not able to show what was in there, is the government either?

Mr. Baxter: But it is sufficient that we show the unlawful acts, to show the trespass of these federal men.

The Court then asked to be shown the Federal Court decision which defendant claimed supported his contention on this point; and defendant's counsel handed to the Court a copy of the decision and opinion in the case of U. S. vs. Cooper, 295 Fed. 709.

The Court then denied the preliminary motions of the defendant, to which rulings of the Court the defendant duly excepted.

A jury was then drawn and the case proceeded to trial. [fol. 16] While the jurors were being called the following took place at the bench and out of hearing of the jurors:

"The Court: After hearing the statements of the counsel at the bench and out of the hearing of the jury, I understand there is a stipulation to be placed on the record, as follows:

Mr. Baxter: This stipulation is made and entered into on behalf of the defendant subject to the defendant's contention that such seizures were made by the federal prohibition agents under color of authority of an illegal, invalid and void search warrant; that said search warrant was void be-

cause it was not served within ten days of the date of its issue; that the same was illegal and invalid because it was issued without probable cause; and that the officers by wantonly destroying the property of the defendant at the time of the purported search, thereby became trespassers, and made all of their acts on that ground alone illegal trespasses; and that, therefore, the evidence obtained by means of such search and seizure cannot lawfully be used against the defendant or his property in an action or proceeding at law; that timely motions setting forth these contentions of law of the defendant were made, together with a motion asking for the return of the property alleged to have been unlawfully seized, and for an order to restrain the use of evidence obtained by means of said illegal and unwarranted search which the defendant claims was made by fed- [fol. 17] eral officers in violation of his constitutional rights, to be secure against unreasonable searches and seizures, to not be deprived of his liberty or property without due process of law, and to not be compelled to be a witness against himself, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

The Court: It is agreed between the counsel for the parties that the stipulation of facts is to be read to the jury and that the reservation of counsel for the defendant will not be read to the jury, but are to be made a part of the record of the trial.

"That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by someone in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; that acting under the color of such search warrant, Prohibition Agents Henry E. March, Bernard J. Dwyer and B. G. Silvernail went to the premises described in the search warrant,

namely, the Bouckville Hotel, of which the defendant is the [fol. 18] proprietor, at Bouckville, New York, in the Northern District of New York, and there, the defendant being present, searched the premises and found one pint of gin, a pint of beer in the bar room of the said premises, and also found in the cellar of said premises under said bar room three and a half barrels of liquid, one of the barrels of which liquid was on tap and connected with faucets in the bar room by means of a pipe which permitted the liquid to be drawn through the faucets under the bar in the bar room; that the said three and a half barrels of liquid were destroyed by the agents while on the premises; that while the defendant admits that such are the facts, the defendant contends that all evidence obtained by the said agents under color of the said search warrant is incompetent, not admissible in evidence and that the government should be excluded by order of the court from giving in evidence any information as to what was found upon the execution of the said search warrant based upon all the reasons set forth in the motion made by the defendant preliminary to the trial in this case; and upon the further ground that the search warrant was wholly invalid and illegal, not having been executed within ten days from its date and having been changed after its issuance and after the expiration of the said ten days of its original date, when all the life and vitality of the said search warrant had ceased, and when the paper was so changed it was invalidated and made of no value whatever."

All of the above took place at the bench and out of the [fol. 19] hearing of the jurors.

The jury having disagreed on the charge of said sale, the evidence presented by both sides there- is omitted from the record.

The stipulation as to the facts concerning the execution of the search warrant and the seizures made thereunder, as dictated by the Trial Court and as above appearing, bearing on the charge of possession, was then read to the jury by the court stenographer.

The prosecution then rested.

Both sides then summed up the case before the jury.

The Court then charged the jury as follows:

"The COURT: GENTLEMEN OF THE JURY: The charges against this defendant which you will consider are two. One is that on the second day of August, 1926, he unlawfully possessed intoxicating liquor, namely, gin. The second is that on June 29th, 1926, he unlawfully sold intoxicating beer, that is beer having an alcoholic content more than permitted by law. You understand, of course, that the fact a man is charged with crime is no evidence of his guilt. Many an innocent man has been charged with crime, some even have been convicted. A charge is not evidence of any kind of the commission of any crime. There must be some formality to take a man from his home or place of business and bring him into court. It is but just and proper that [fol. 20] there be some definite and specific charge made known to a man who is brought into court for trial, so he may know in advance what he is charged with and be prepared to meet it. It is for such purpose that charges are made formally, definitely and specifically, but they prove nothing about the guilt of the person or persons so charged. On the contrary, the presumption is that the person so charged is innocent until he is shown to be guilty by evidence which convinces the jury beyond reasonable doubt. So, the government must establish by evidence in this case which convinces you beyond a reasonable doubt, that the defendant is guilty of one or both of the offences charged against him. Returning, first, to the charge of possession on the second day of August, 1926. It is stipulated in this case, and by "stipulated" is meant "agreed," that is, the defendant admits, that on that date, at his Hotel in Bouckville, in this District, behind the bar, he had gin. He makes no question of unlawful possession. The government claims there has been no explanation of its possession. So, I take it, you will not need to spend much time in determining whether or not the defendant is guilty of the crime of unlawful possession. The other charge is that on the second day of June, 1926, he unlawfully sold intoxicating liquor, namely, beer, so called "good" beer, meaning thereby beer with presumably a pre-prohibition alcoholic content, beer such as there was before the days of prohibition. Though thee*r* is no direct evidence in that respect. [fol. 21] I think you may take it as common knowledge that when beer is spoken of as "good" beer, sometimes, at least, it means that kind of beer. The government has produced

its agent, one Dodd, who, as you will recall from the evidence, has been in the Philippine Constabulary and a Civil Engineer, and so forth, before he became a prohibition officer, and he says that at the time in question he stopped at this place, that he went in ostensibly to inquire about the roads, and that while there he asked for and was given a glass of beer; he says he remarked to the man about it, that it was pretty good beer and wondered where he could get such beer; that the man who sold it to him is the defendant, that he recognizes him as the man. He further says that he drank some of the beer and then, according to his testimony, he retained some in his mouth, went outside and to his car and rejected it from his mouth into a bottle and put a tablet or half a tablet, of bichloride of mercury in it; that later he returned to the premises, according to his testimony, to get another look at the man who sold him the beer so he would be able to identify him thereafter. He says this defendant is the man. At the time he made the purchase of the beer, he says he asked this man where he could get such good beer and the defendant said he got it in Utica; that he also asked if he did not have to go after it and he, the defendant, said "No," it was delivered to him. Of course, [fol. 22] this is all according to the testimony of the government's witness. There was a discussion about the price. The government's witness said the defendant told him it cost twenty-eight dollars a barrel. The government's witness also says that he has had abundant experience in drinking near beer, which is beer with an alcoholic content less than one-half of one per cent, practically no alcoholic content, and in drinking beer with an alcoholic content in excess thereof. He says that when there is an alcoholic content of two and a half or more per cent he can tell it is beer with alcohol in it, but below that he is unable to tell, but that he does know the difference between the beer that does have an alcoholic content of more than two and a half per cent and beer with none or less than a half of one per cent. He says he can tell it by the taste; that he has tasted it for a good many years, I have forgotten how many, you will recall the evidence, and he says this was beer with an alcoholic content of two and a half per cent or more. He also says that he made a test of that portion of the glass of beer which he retained in his mouth and, as soon as he got outside, ejected it into the bottle, placing bichloride of

mercury in it, kept it in the bottle and took it to Syracuse; that at Syracuse he made the test called the ebul-*oi*meter test. The witness Dodd not being a chemist, the government chemist has been sworn and he says this test is one of the accepted approved methods of determining the alcoholic content of such liquids or beverages and that it is a reason-[fol. 23] ably accurate method of determining the alcoholic content. The man Dodd tells you how he used it, and the government chemist also told you the method of using it, which, as I recall, corresponds. Just what the witness Dodd testified about the boiling points of the water and the mixture, as to which was the higher, I do not recall. At any rate, the general method is to take the difference in temperature, that is, the boiling point, of water without alcohol, which requires a higher boiling point than water with alcohol and then that of water with alcohol and, after finding the difference between the two temperatures, or boiling points, they take a table and by the use of that table, possibly something like an interest table or a table of logarithms, determine the percentage of alcohol present. Dodd says that is the method he followed and the chemist says it is an accepted and approved method. Dodd says, by that method, he found that the liquid in question contained 4.85 per cent of alcohol. The defendant says, in substance, this is all wrong; he never had any good beer, or intoxicating beer, beer with more than one-half of one per cent, in his premises at any time; that the only beer he had was near beer, which he purchased of the West End Brewing Company in Utica. This trial is in Utica. The West End Brewing Company is located here, according to the testimony, and the defendant might have presented corroboratory testimony of that, possibly, if it were true. He says also that he never saw this man Dodd, that this man [fol. 24] was never in his place; that he never had any intoxicating beer and he never had any intoxicating beverage of any kind.

Either Dodd or the defendant is mistaken; both cannot be telling the truth; and the determination of the question of whether or not there was a sale of intoxicating liquor by the defendant on that occasion largely depends upon who is telling the truth. In determining who is telling the truth you have the right, very naturally and as men of common sense, to take into consideration the interest which these

conflicting witnesses have in the outcome of the case. If you can see that either witness has a great, not to say vital interest in the outcome of the case, you may ask yourselves whether or not the testimony of such a witness is as much to be relied upon as that of one whose interest is not so great; in other words, is the testimony of either witness likely to be and is it given to serve his own interest. If you find there is a witness in this case on this point who is greatly interested in the outcome of the case, you may take that into consideration in determining whether you will believe him and how much credibility you will attach to his testimony, and whether there is reason to believe that his testimony would cast a reasonable doubt upon the testimony of any other witness not thus situated, if there be any other witness not thus situated.

The rule of reasonable doubt will be expounded to you in a moment, but it does not necessarily give rise to reasonable doubt because one man contradicts another man. [fol. 25] You can readily see that, if that were necessarily so, no person charged with crime, who saw fit to deny that he committed the crime, could ever be convicted, because reasonable doubt would necessarily arise. All that I am saying is that reasonable doubt does not necessarily arise because one man contradicts another. I am not saying that it may not arise or that is does not arise in this case.

Another thing—there is a stipulation in this case to the effect that such and such things were destroyed, certain liquids; it does not say anything about the character of the liquids, what they were. The stipulation says certain liquids were on the premises on August second, the date that the gin was found. There is no evidence as to what those liquids were or why they were destroyed or anything else, and I charge you that they do not enter into this case and you are to give no consideration whatever in your decision of this case as to the guilt or innocence of the defendant on either or both of the charges, to them; you are to attach no consideration, give any weight to, you are not to consider at all the question of these three and a half barrels of liquid which were destroyed. They are not in the case and there is no question involving them now before you.

In a criminal case the burden of proof is upon the prosecution and it must prove every material fact and establish

[fol. 26] the guilt of the defendant to your satisfaction beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but tne evidence must produce that effect on the minds of the individual jurors so that after its consideration, that is, after considering the evidence, each juror can, in view of his oath, have no reasonable doubt of the guilt of the accused.

By reasonable doubt I mean a doubt arising out of the evidence, not an imaginary doubt, a fanciful conjecture or a strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved, a doubt for which a good reason can be given, which reason must be based on the evidence or on the want of evidence.

When such a doubt exists the accused is entitled to its benefit and should be acquitted, but where the evidence is satisfactory to an impartial mind that the crime was committed, that the defendant committed it as charged, when the mind comes naturally and reasonably to such a conclusion from a fair consideration of the evidence, then there can be no reasonable doubt and the prisoner should be convicted.

So you will take all the facts and circumstances in this case into consideration. You have heard the evidence in this case describing what kind of premises this was, a [fol. 27] hotel in Bouckville, New York. You have heard about this bar room, the bar and faucets and things of that sort and you have seen the defendant; you have seen the witnesses for the government; you have heard their testimony. You will decide whether this defendant sold intoxicating beer on the twenty-ninth of June or whether he did not; whether he possessed gin on the second of August unlawfully, or whether he did not. And in deciding these questions all you have to do is to keep uppermost in your minds the thought that you are deciding questions of fact, did he or did he not, and let no other considerations of any kind enter into it. The world will go on, whatever be the result of this tral, but you should not allow your prejudices, if any you have, in any way to enter into your decision at all. Whatever you may think or I may think or anybody here may think about this particular law, or whether or not there should be any modifica-

tion of this law, has nothing whatever to do with this case and it has no place with you in the jury room. You must decide the facts and let those who are charged with the responsibility for the enactment and repeal of laws assume the responsibility. While the law is here, and it is here, it is your duty and my duty to take this law just like any other law and not in any other way, without feeling of any kind whatever. It is the law and it must be accepted as in biblical times the Word of God was accepted, under what they then believed was the medium of the expression of the Word of God. It is the law. That is all [fol. 28] there is to it. Did the defendant do this, or did he not. That is all there is for you to say. If you do that your consciences will be clear and you will not be subject to any criticism. You have done your full duty.

So, take this case, gentlemen and decide these two questions merely and solely—did he? or, Did he not? and let nothing else enter into the consideration."

The jury retired at 11:45 A. M.

The jury returned at 4:27 P. M. and returned a verdict finding the defendant guilty as charged in the possession count, and disagreed on the sale count. Counsel for defense then moved to set aside the verdict finding the defendant guilty on the charge of possession on the grounds that there was no legal evidence and not sufficient evidence to warrant the jury in finding a verdict of guilty on that count. Also on all the preliminary motions of defendant and objections and exceptions on the constitutional grounds as recited in the stipulation, but the court overruled the motion and the defendant duly excepted.

The Court then returned judgment of conviction on first count, possession and sentenced defendant to pay a fine of $500 or stand committed to the Chenango County jail until the fine is paid; to which judgment of the Court the defendant, by his counsel, duly excepted.

This is to certify that the foregong bill of exceptions ten- [fol. 29] dered by the defendant is correct in every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open court this 7th day of September, 1927.

Frank Cooper, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR, SUPERSEDEAS, AND BAIL

To the Honorable Frank Cooper, Judge of the District Court of the United States for the Northern District of New York:

And now comes Cesaro Sgro, the Defendant in the above entitled cause, and feeling himself aggrieved by the judg-[fol. 30] ment of the District Court of the United States, for the Northern District of New York, entered on the 22nd day of December, 1926, hereby petitions for an order allowing him, said Defendant, to prosecute a Writ of Error from the United States Circuit Court of Appeals for the Second Circuit, to the District Court of Appeals for the Second Circuit, to the District Court of the United States, for the Northern District of New York; that said writ of error may be made a supersedeas, and that your petitioner be released on bail in an amount to be fixed by the Judge thereof, pending the final disposition of said Writ of Error. Assignment of Errors is filed with this petition.

Dated December 22nd, 1926.

Cesaro Sgro, by I. K. Baxter, His Attorney.

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[fol. 31] ASSIGNMENT OF ERRORS

And now, on this 22nd day of December, 1926, comes the defendant, Cesaro Sgro, by his attorney, I. K. Baxter, Esq., and says: That the judgment of conviction in the above case against him on the 22nd day of December, 1926, is erroneous and unjust to the defendant, because:

First

The Court erred *y*in denying the preliminary motion of the defendant to vacate the search warrant herein, because

said search warrant was issued without probable cause solely upon the affidavit of Charles G. Dodd, which alleged no facts and not sufficient facts to constitute probable cause for issuing a search warrant as required by law.

Second

The Court erred in denying the preliminary motion of the defendant to declare the search warrant herein null and void; because said search warrant had been dated and issued on the 6th day of July, 1926, and was not executed within 10 days of the date of its issue and was, therefore, void under the statutes of the United States in such case made and provided.

Third

The Court erred in denying the preliminary motion of the defendant to declare all the acts of the federal officers, [fol. 32] purporting to execute the search warrant herein, trespasses; because said officers at the time of the purported execution of said search warrant wilfully and maliciously and unlawfully destroyed property of the defendant and by such acts became wanton trespassers and were, therefore, trespassers ab initio.

Fourth

The Court erred in denying the motion of the defendant to restrain the use of evidence obtained by federal officers through the search and seizure under color of authority of the search warrant herein; because said search warrant was illegal and invalid, because said search warrant was void, and because the acts of said federal officers on the purported execution of said search warrant were trespassers ab initio; and because said search and seizure was, therefore, made without any warrant or authority in law by federal officers in violation of the defendant's constitutional rights to be secure against unreasonable searches and seizures, to not be deprived of his property without due process of law, and to not be compelled to give evidence against himself as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

Fifth

The Court erred in admitting over the objections and exceptions of the defendant at the time of trial evidence

obtained by means of a search and seizure of defendant's [fol. 33] property by federal officers on August 2nd, 1926; because said search and seizure was made under color of authority of an illegal, invalid and void search warrant, and was trespass ab initio by said federal officers; and was, therefore, made without any warrant or authority in law, in violation of defendant's constitutional rights, to be secure against unreasonable searches and seizures, to not be deprived of his property without due process of law, and to not be compelled to be a witness against himself, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

Sixth

The Court erred in denying the motion of the defendant herein to set aside the verdict of the jury finding defendant guilty on the first count, possession, of the information herein, on the ground that there was not sufficient evidence and not any legal evidence to support such a verdict; because the only evidence presented on the trial on said count had been obtained through the illegal and unwarranted search and seizure of defendant's property, in violation of his constitutional rights, as aforesaid.

Seventh

The Judgment of the Court is contrary to law as shown in the foregoing Assignment of Errors.

Wherefore the defendant and plaintiff-in-error prays that the said judgment of the District Court of the United [fol. 34] States may be reversed and held for naught.

I. K. Baxter, Attorney for Petitioner, 66 Genesee Street, Utica, N. Y.

In United States District Court

[Title omitted]

Order Allowing Writ of Error and Admitting Defendant to Bail—Dec. 22, 1926

Let a Writ of Error issue from the United States Circuit Court of Appeals for the Second Circuit to the United [fol. 35] States District Court for the Northern District of

New York, as prayed for in the petition of the said Cesaro Sgro; and that a citation be issued to the Defendant in Error.

And it now appearing that a citation has been served in the cause, it is now ordered that the Writ of Error, allowed as above stated, operate as a Supersedeas, and the defendant be admitted to bail, upon furnishing a bond in the penal sum of two thousand dollars ($2,000.0-), conditioned according to law to be approved by me.

Frank Cooper, Judge.

[fol. 36] Citation, in usual form, showing service on Floyd S. Spangle, omitted in printing.

[fol. 37] In United States District Court

[Title omitted]

Order Allowing Extension of Time—Jan. 19, 1927

This cause coming on further to be heard before this Court on the petition of the above named defendant, Cesaro Sgro, for a Writ of Error to review the conviction of said Defendant herein upon Count I, possession, of the Information herein; and it appearing to this Court that the said Defendant has been unable to procure the stenographic record herein so as to specifically set forth the Assignment of Errors; but that said Defendant has filed Assignment of [fol. 38] Errors herein for the consideration of this Court on said application; and a Writ of Error having been allowed and filed herein; and due deliberation having been had thereon;

Now, on Motion of I. K. Baxter, Esq., Attorney for said Defendant, Cesaro Sgro, It Is Hereby

Ordered, That the December Term of this Court be extended 250 days from the date hereof for the purpose of signing and settling the Bill of Exceptions to be signed and settled and filed therein, and for all other purposes; and It Is Further

Ordered, That the United States of America, Complained herein, be granted an extension of time to be and appear at the United States Circuit Court of Appeals for the Second Circuit at the City of New York, N. Y., of 250 days from the date hereof.

Frank Cooper, United States District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION DISPENSING WITH COMPARISON BY THE CLERK

It is hereby stipulated between the parties that the foregoing record is the record of writ of error herein, and further comparison by the Clerk be dispensed with.

Dated September 27th, 1927.

Irving K. Baxter, Attorney for Plaintiff in Error.
Oliver D. Burden, Attorney for Defendant in Error and United States Attorney.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Before Manton, A. N. Hand, and Chase, Circuit Judges

Appeal from the District Court of the United States for the Northern District of New York

I. K. Baxter, Esq., Attorney for Plaintiff in Error.
Oliver D. Burden, Esq., United States Attorney, for Defendant in Error.

OPINION—Filed Jan. 18, 1932

Per CURIAM:

Judgment affirmed.

[fols. 41 & 42] In United States Circuit Court of Appeals

Judgment—Jan. 25, 1932

Appeal from the District Court of the United States for the Northern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fols. 43-52] Petition for rehearing, covering nine pages, omitted from this print. It was denied and nothing more by order of February 9, 1932.

[fol. 53] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing—Feb. 9, 1932

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for argument on Monday, October 10th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAY
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. ~~320~~ 55

CEASARO SGRO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

IRVING K. BAXTER,
Counsel for Petitioner.

(36,734)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 920

CEASARO SGRO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Ceasaro Sgro, respectfully represents that he is a citizen of the United States, residing in the Village of Bouckville, N. Y., and is the plaintiff in error in the above-entitled matter; that on the 2nd day of August, 1926, Federal Prohibition Agent B. G. Silvernail and others searched defendant's hotel on the Main Street at Bouckville, N. Y., under color of authority of a search warrant issued by W. M. Arthur, U. S. Commissioner at Rome, N. Y., on the 6th day of

July, 1926; that because this search warrant was not "executed * * * within ten days after its date," it became void by statute (Sec. 621, U. S. Code, p. 508); that after becoming void as aforesaid said warrant was returned to the Commissioner's office by Prohibition Agent Vandiver with the request that it be redated, and on the 27th day of July, 1926, the date of the warrant was changed (by the Commissioner's stenographer) to that date and mailed back to the said prohibition agent.

The search warrant was illegally issued, without probable cause, solely upon the affidavit of Prohibition Agent Dodd, made July 6, 1926, wherein said agent alleged as his opinion that on June 29, 1926, he purchased at the premises a drink of beer, having an unlawful alcoholic content, without showing or having any expert qualification to give such opinion evidence.

At the December, 1926, term of the U. S. District Court for the Northern District of New York, petitioner moved to restrain the use of evidence unlawfully obtained by Federal prohibition agents through their search and seizure at petitioner's said hotel premises, under color of authority of said illegal and void warrant, on said 2nd day of August, 1926. The particular grounds of the motion were that the search warrant was void under the statute, because it was not served within ten days after its date; that it was illegally issued, without probable cause, in that the affidavit of Agent Dodd failed to state any facts, but instead thereof stated merely unwarranted and incor-

rect opinions and conclusions of the affiant, and that the evidence having been obtained by Federal agents through search and seizure under color of authority of an illegal and void search warrant, was therefore obtained without any warrant or authority in law, and in violation of petitioner's constitutional rights under the Fourth Amendment to the Constitution of the United States, and the use of such evidence against the defendant would be in violation of his rights under the Fifth Amendment to the Constitution.

The motions were denied, the petitioner was arraigned, and pleaded not guilty before the court upon the charges of illegal sale of beer to Agent Dodd on June 29, 1926, and illegal possession of beer and one pint of gin claimed to have been seized by said agents on execution of the search warrant at petitioner's premises on the 2nd day of August, 1926. The case then proceeded to trial. The evidence obtained by search and seizure under color of authority of said illegal and void search warrant was used over the objections and exceptions of the defendant on the constitutional grounds as aforesaid. The jury disagreed on the charge of sale, but rendered a verdict of guilty upon the charge of possession, and the court rendered its judgment of conviction accordingly and fined the defendant $500.00.

The case was reviewed on writ of error by the Circuit Court of Appeals for the Second Circuit, and judgment of the District Court was affirmed without opinion on the 18th day of January, 1932. On the 28th day of January, 1932, the plaintiff in error pe-

titioned for a rehearing, and urged to the attention of the Circuit Court; that admittedly the search warrant was issued on the 6th day of July, 1926; that it was not served within ten days of its date of issue, as required by statute, and therefore became void under the statute; that the mere redating of said void search warrant on the 27th day of July, 1926, did not and could not revive or validate said void warrant; also, that it was not competent for the affiant to state in the affidavit for the search warrant that the liquid he bought was beer having an unlawful alcoholic content, because he showed no expert qualification to give such opinion evidence; that it was also improper for him to testify that he tested the liquid, because he did not show that he could as an expert intelligently have done so; that the judgment of conviction was based solely upon the illegal evidence obtained by prohibition agents through their unlawful search of defendant's premises under color of authority of said illgal and void search warrant; that said search violated the defendant's rights under the Fourth Amendment to the Constitution, and the use of the evidence obtained by it against the defendant violated his rights under the Fifth Amendment to the Constitution.

The questions represented by the assignments of error in this cause are of broad, general interest because they relate generally to the issuance and execution of search warrants and to the rights of the people under the Fourth and Fifth Amendments to our Constitution, which rights this Court has frequently

declared to be indispensable to the full enjoyment of personal security, personal liberty, and private property and of the very essence of constitutional liberty.

The grounds upon which it is insisted that the judgment of the Circuit Court of Appeals should be reversed are: That the said court has here decided important questions of Federal law in a way probably untenable, in conflict with the decisions of other Circuit Courts of Appeals on the same matter, and in conflict with applicable decisions of this Court; because—

> (*a*) The said search warrant was void under Sec. 621, U. S. Code, p. 508; because it was not executed within ten days of its date and "after the expiration of this time the warrant, unless executed, is void";
>
> (*b*) The affidavit upon which the search warrant was issued did not "set forth the facts tending to establish the grounds of the application," etc., as required by Sec. 615, U. S. Code, p. 508;
>
> (*c*) The search and seizure having been made under color of authority of an illegal and void search warrant was, therefore, made without any warrant or authority in law and in violation of petitioner's rights under the Fourth Amendment to the Constitution of the United States; and the use of the evidence so illegally obtained violated the petitioner's rights under the Fifth Amendment to our Constitution,

as more fully appears in petitioner's brief hereto annexed.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled Ceasaro Sgro, plaintiff in error, *vs.* United States of America, defendant in error, No. 11777, to the end that the said case may be reviewed and determined by this Court, as provided in Judicial Code, Sec. 240, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable Court.

And thus your petitioner will ever pray.

CEASARO SGRO,
Petitioner.

IRVING K. BAXTER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

There was no formal opinion written by the trial judge.

The preliminary motions and trial were before the Hon. Frank Cooper, judge of the United States District Court for the Northern District of New York. He announced in overruling defendant's preliminary motions:

> "I hold that within a reasonable time after the date of the offense alleged, after the date of the probable case is brought to the attention of the commissioner, he may issue a search warrant and if ten days has elapsed without its execution, he may change the date and thereby extend that search warrant or he may issue a new one. He has power to do both. It matters not which way he does it" (R. 11).

The Circuit Court of Appeals for the Second Circuit merely affirmed "Per Curiam," without opinion (R. 40).

Judgment to be Reviewed.

Motion to quash evidence (R. 10 and 12).

Motion denied (R. 15).

Objection to the use of evidence on trial obtained by Federal agents by search and seizure under color of authority of an illegal and void search warrant; "that said search warrant was void because it was not

served within ten days of the date of its issue; that the same was illegal and invalid because it was issued without probable cause; * * * the evidence obtained by means of such search and seizure cannot lawfully be used against the defendant * * * said illegal and unwarranted search * * * was made by Federal officers in violation of his constitutional rights, to be secure against unreasonable searches and seizures, to not be deprived of his liberty or property without due process of law, and to not be compelled to be a witness against himself, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States" (R. 16 and 17).

Motions denied. Objections overruled. Evidence obtained by illegal search used, and formed sole basis of judgment of conviction on possession count. The jury disagreed on the sale count. The court rendered judgment of conviction on the possession count, and sentenced the defendant to pay a fine of $500.00 (R. 28).

Judgment of the United States Circuit Court of Appeals for the Second Circuit was as follows: "Per Curiam: Judgment affirmed" (R. 40).

Claims and Rulings.

On his preliminary motions petitioner claimed:

That the search warrant was illegal, because it was issued solely upon an affidavit in which there were no facts stated to constitute probable cause for issuing the same, but merely some alleged opinions and conclusions of the affiant, which he was not shown quali-

fied to give (R. 12). The court overruled the motion to declare the search warrant illegal and invalid on these grounds, without opinion (R. 15).

That the search warrant was void under Section 621, U. S. Code, p. 508, because it was not executed within ten days after its date. The warrant was issued on July 6, 1926. No attempt was made to execute it until August 2, 1926. On July 27, 1926, the Commissioner's stenographer changed the date of the warrant to that date. The court ruled "that within a reasonable time * * * after the date of the probable cause is brought to the attention of the commissioner, he may issue a search warrant and if ten days has elapsed without its execution, he may change the date and thereby extend that search warrant," and denied the motion to declare the search warrant void (R. 11).

That the search and seizure by Federal officers under color of authority of this illegal and void search warrant violated petitioner's rights under the Fourth Amendment, and the use of the evidence obtained by such search against him violated his rights under the Fifth Amendment. The court overruled the same without comment.

The evidence unlawfully obtained, as aforesaid, was used on the trial and the conviction based thereon, over appropriate objections and exceptions.

At the review on writ of error by the Circuit Court of Appeals, petitioner claimed in printed brief and oral argument that the search warrant was illegal and void for the reasons aforesaid, and that the conviction

was illegal, being based solely on the evidence illegally obtained, as aforesaid. But the Circuit Court of Appeals, nevertheless, affirmed without comment.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, Sec. 240 (*a*), of the Judicial Code of the United States, which provides:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The following cases are believed to sustain the jurisdiction of this Court:

Cameron v. *United States,* 231 U. S. 710.

Meccano, Limited, v. *John Wanamaker, New York,* 253 U. S. 136.

Statement of the Case.

On July 6, 1926, Federal Prohibition Agent Dodd made an affidavit before W. M. Arthur, U. S. Commissioner at Rome, N. Y., wherein he alleged that he believed that intoxicating liquors were being unlawfully possessed at the hotel in the Village of Bouckville, N. Y., and that the sources of his said belief

were as follows: "That on June 29, 1926, deponent personally purchased of a person in charge at said premises, a drink of intoxicating liquor, to wit, beer, containing more than one-half of one per cent of alcohol by volume, for the sum of $.10. That deponent tested the said beer, which he took with him, and same was found to contain 4.85 per cent of alcohol by volume" (R. 5). The commissioner thereupon, on said 6th day of July, 1926, issued a search warrant directing a search of said premises for intoxicating liquor. The search warrant was not executed within ten days after its date, as required by statute; but, twenty-one days after its date, it was returned to the commissioner by the prohibition agent in charge of the Syracuse office with the request that it be reissued or redated (R. 7). On August 2, 1926, three prohibition agents went to the premises described in the search warrant, to wit, the defendant's hotel premises at Bouckville, N. Y., searched the same, and claimed to have found a pint of gin and some alleged beer (R. 18).

The defendant was arraigned before the U. S. District Court for the Northern District of New York at the Utica term in the year 1926, upon the charges of illegally possessing the alleged intoxicating liquor seized under color of authority of said search warrant on August 2, 1926, and with illegal sale to Agent Dodd on June 29, 1926, of one glass of alleged intoxicating liquor, to wit, beer. At said time and before pleading, the defendant objected to the validity and legality of the said search warrant on the ground that

the same had been issued without probable cause, in violation of the Fourth Amendment to the Constitution of the United States and in violation of Sec. 615, U. S. Code, p. 508, and was therefore illegal, and the further ground that it was not executed within ten days of its date of issue, as required by Sec. 621, U. S. Code, p. 508, and was therefore void by statute. The defendant further moved at said time for the return of the property illegally seized under color of authority of said search warrant and to quash the evidence obtained by Federal prohibition agent by search and seizure under color of authority of said search warrant, on the ground that the said search by Federal officers, having been made under color of authority of an illegal and void search warrant, was therefore made without any warrant or authority in law, and in violation of the defendant's constitutional rights to be secure against unreasonable searches and seizures, and not to be compelled to testify against himself in a criminal action.

The trial court overruled all of the preliminary objections and motions, and the case proceeded to trial. Prohibition Agent Dodd testified substantially that on the 29th day of June, 1926, he visited the defendant's hotel premises and there bought from him a glass of beer; that he drank some of the said beer and retained some in his mouth; that he then left the hotel premises and went to his car, where he ejected the liquid from his mouth into a bottle and put some bichloride of mercury also into said bottle; that he later tested this liquid by comparing its boiling point

with the boiling point of water, "and by that method he found that the liquid in question contained 4.85 per cent of alcohol" (R. 23). But he found the boiling point of the liquid to be higher than the boiling point of water. Whereas, as the chemist testified, the boiling point of water is higher than the boiling point of a liquid containing alcohol. Of course Agent Dodd was not a chemist (R. 23). In his affidavit for search warrant he showed no qualification to determine the alcoholic content of a liquid by testing it. In his testimony before the court he showed that he could not intelligently have done so. It is thus seen that the search warrant was issued without probable cause, and that the agent's affidavit not only failed to state facts, but instead thereof stated merely his unqualified and erroneous opinions.

The jury did not find the defendant guilty of the alleged sale, but did find him guilty of possession of the alleged liquor seized on execution of the search warrant. The judgment of conviction, having been based solely upon the evidence illegally obtained by the prohibition agents through search and seizure at defendant's premises under color of authority of the illegal and void search warrant, was illegal and should have been reversed by the Circuit Court.

The case was reviewed on writ of error by the Circuit Court of Appeals for the Second Circuit and judgment was rendered on the 18th day of January, 1932, affirming the judgment of the District Court without opinion. Petition for rehearing was denied by the Circuit Court on February 1st, 1932 (R. 47).

Specification of Assigned Errors Intended to be Urged.

FIRST.

The trial court erred in denying the preliminary motion of the defendant to vacate the search warrant herein, because said search warrant was issued without probable cause, solely upon the affidavit of Prohibition Agent Dodd, which alleged no facts, and not sufficient facts, to constitute probable cause for issuing a search warrant.

SECOND.

The court erred in denying the preliminary motion of the defendant to declare the search warrant herein null and void, because said search warrant was dated and issued on the 6th day of July, 1926, and was not executed within ten days after its date of issue, and was, therefore, void under Sec. 621, U. S. Code, p. 508.

THIRD.

The court erred in denying the motion of the defendant to restrain the use of evidence obtained by Federal officers through the search and seizure under color of authority of the search warrant herein, because said search warrant was illegal and invalid; because said search warrant was void at the time it was served, and because said search and seizure was therefore made without any warrant or authority in law by Federal officers, in violaion of the defendant's

constitutional rights to be secure against unreasonable searches and seizures and to not be compelled to testify against himself, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

FOURTH.

The court erred in admitting over the objections and exceptions of the defendant at the time of trial evidence obtained by means of the search and seizure of defendant's property by Federal officers on August 2nd, 1926, because said search and seizure was made under color of authority of an illegal, invalid and void search warrant, and was, therefore, made without any warrant or authority in law, in violation of defendant's constitutional rights to be secure against unreasonable searches and seizures, to not be deprived of his property without due process of law, and to not be compelled to be a witness against himself, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

FIFTH.

The court erred in denying the motion of the defendant herein to set aside the verdict of the jury finding defendant guilty on the first count, possession, of the information herein, on the ground that there was not sufficient evidence and not any legal evidence to support such a verdict, because the only evidence presented on the trial on said count had been obtained through the illegal and unwarranted search and seiz-

ure of defendant's property, in violation of his constitutional rights, as aforesaid.

Summary of Argument.

The lower court erred in affirming the judgment herein, because said judgment was shown to have been based entirely upon illegal evidence, which had been obtained through an illegal search and seizure of petitioner's premises by Federal agents. This search was made under color of authority of an illegal and void search warrant.

The search warrant was illgal because it was issued without probable cause and solely upon an affidavit which failed to state facts to constitute probable cause, as required by law. The affidavit upon which the search warrant was issued stated merely some opinions and conclusions by the affiant, but did not show him qualified to give such opinions or conclusions. The substance of the said affidavit was that the affiant tested a sample of what he called beer and thereby found the same to have an unlawful alcoholic content. Not only did the affidavit fail to show the affiant qualified to make such test, but on the trial the affiant showed that he was not a chemist and did not and could not intelligently have made such test. The affiant's testimony showed that the sample of liquid he was trying to test had a higher boiling point than water. The affiant's alleged test, therefore, in so far as it showed anything, indicated an entire absence of alcohol in the sample he attempted to test.

The search warrant was void at the time it was served because it was not executed within ten days of its date. After that time, because of the failure to execute it within the ten-day period prescribed by statute, the warrant became void by statute.

The search and seizure, having been made under color of authority of an illegal and void search warrant, was therefore made without any warrant or authority in law. The search was therefore unreasonable and in violation of the Fourth Amendment, and the use of the illegal evidence, obtained by it, amounted to compelling the petitioner to give evidence against himself in a criminal action, in violation of the Fifth Amendment.

Timely and appropriate motions and objections were urged in behalf of the petitioner on all of the above grounds, both before the trial court, and especially at the review on writ of error before the Circuit Court of Appeals.

The judgment, being shown to be contrary to law in all the particulars as aforesaid, should have been reversed, yet the Circuit Court of Appeals affirmed the same, without opinion.

ARGUMENT.

Point I.

The search warrant was illegal and invalid because it was issued without probable cause, and the affidavit upon which it was issued did not set forth facts to establish grounds for issuing it.

The Fourth Amendment to the Constitution of the United States provides in part as follows:

> "No warants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched."

Section 615, U. S. Code, page 508, provides:

> "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

The allegations in the affidavit upon which the search warrant was issued were:

> "That on June 29, 1926, deponent personally purchased of a person in charge at said premises a drink of intoxicating liquor, to wit, beer, containing more than one-half of one per cent of alcohol by volume, for the sum of $.10. That deponent tested the said beer which he took with him and same was found to contain 4.85% of alcohol by volume" (R. 5, 6).

The first-quoted sentence is merely a statement of the affiant's opinion or conclusion that what he purchased was beer having an unlawful alcoholic content. The second sentence purports to give the affiant's grounds or reason for his said conclusion. But these grounds are merely again his conclusions, and erroneous conclusions, as shown by his testimony at the trial. The affiant was not a chemist. He made no claim in the affidavit that he tasted or drank any of the alleged beer, or that he formed any opinion as to its alcoholic content by tasting or drinking it. He merely says that he took it with him and tested it. At

the trial he said that the way he did this was by retaining some of it in his mouth when he left the premises, going to his car and there ejecting it into a bottle, into which he also put bichloride of mercury, and later comparing the boiling point of water with that of the mixture. But he found the boiling point of the mixture to be higher than that of water. Whereas the boiling point of a mixture of alcohol and water is lower than that of water (R. 22, 23).

As shown above, there were no facts alleged in the affidavit to support a finding of probable cause. The warrant was therefore illegally issued in violation of the provisions of the Fourth Amendment to the Constitution and Section 615, U. S. Code (*supra*).

In *Wagner* v. *U. S.* (C. C. A., 8th Circuit), 8 F. 2d 581, at page 583, the Court said:

> "The evidence before the Judge or Commissioner who issues the search warrant must be such as would be admissible on trial. *Giles* v. *U. S.* (C. C. A.), 284 F. 208, 214. The Commissioner must be furnished with facts—not suspicions, beliefs, or surmises. *Veeder* v. *U. S.*, 252 F. 414, 164 C. C. A. 338. A mere conclusion is insufficient either in the affidavit or the complaint. *U. S.* v. *Kaplan* (D. C.), 286 F. 963, 969."

In *Kervin* v. *U. S.* (C. C. A., 2nd Circuit), 5 F. 2d 282, at page 285, the Court said:

> "Constitutional rights must be equally enforced in favor of the guilty and innocent. Unless sufficient facts are shown under oath to support the finding of probable cause, the right of

a person to be secure from unreasonable searches and seizures must not be violated."

In *Steele* v. *U. S.*, 267 U. S. 489, this Court said:

> "In a recent case we have had occasion to lay down what is probable cause for a search. *Carroll* v. *U. S.*, 267 U. S. 132, 45 S. Ct. 280, 69. L. Ed. —, decided March 2, 1925. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

POINT II.

The warrant was not executed within ten days after its date. After the expiration of this time the warrant became and was void under the statute.

Section 621, U. S. Code, page 508, provides:

> "A search warrant must be executed and returned to the Judge or Commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void (June 15, 1917, C. 30, Title XI, Sec. 11, 40 Stat. 229)."

The Commissioner who issued the search warrant certified:

> "That the complaint or affidavit, upon which the search warrant was issued in the above entitled matter, was made before me on the 6th day of July, 1926. That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten

> days prescribed by statute, and was returned to me by Albert Vandiver, prohibition agent in charge of the Syracuse office, requesting that the same be reissued or redated, and my docket book shows that the same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver" (R. 7).

The facts that the search warrant was dated and issued July 6, 1926, that it was not executed or returned within ten days after its date, that three weeks later its date was changed to July 27, 1926, and that this change of date was made without any new information or affidavit, are not disputed. The trial court even alleged them in a stipulation which it dictated at the trial (R. 17).

But the trial court erroneously ruled:

> "I hold that within a reasonable time after the date of the offense alleged, after the date of the probable cause is brought to the attention of the Commissioner, he may issue a search warrant; and, if ten days has elapsed without its execution, he may change the date and thereby extend that search warrant or he may issue a new one. He has power to do both. It matters not which way he does it" (R. 11).

The trial court was doubtless correct in ruling that within a reasonable time after the date of the alleged offense and when the probable cause is properly brought to his attention a commissioner may issue a search warrant. But clearly the court erred in holding that, after the lapse of ten days without its execution, he might lawfully change the date and thereby

extend that search warrant. This ruling is in direct conflict with the statute above quoted, which provides that "after the expiration of this time the warrant, unless executed, is void" (Sec. 621, *supra*). To permit such erroneous ruling to stand would be substantially to repeal the statute and set it at naught. Also, since there was no information, affidavit or probable cause submitted to or pending before the commissioner at the time, such redating or reissuing was in direct violation of the Fourth Amendment to the Constitution.

POINT III.

The search and seizure were illegal and violated the petitioner's rights under the Fourth Amendment to the Constitution of the United States. The use of the evidence obtained thereby violated his rights under the Fifth Amendment.

As shown in Point I, the search warrant was illegally issued and invalid because it was issued without probable cause. As shown in Point II, the warrant was void because it was not executed within ten days after its date. The search and seizure, having been made under color of authority of an invalid and void search warrant, was therefore made without any warrant or authority in law and in violation of the Fourth Amendment; and the use of the evidence obtained thereby violated the defendant's rights under the Fifth Amendment, because it in effect compelled him to be a witness against himself in a criminal action.

In *Gouled* v. *United States*, 255 U. S. 298, at page 303, this Court said:

"The Fourth Amendment reads, 'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.' The part of the Fifth Amendment here involved reads, 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and the Court (in *Boyd* v. *United States,* 116 U. S., 616; in *Weeks* v. *United States,* 232 U. S., 383, and in *Silverthorne Lumber Co.* v. *United States,* 251 U. S., 285) have declared the importance to political liberty and to the welfare of our country of due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: that such rights are declared to be indispensible to the 'full enjoyment of personal security, personal liberty and private property;' that they are to be regarded as of the very essence of constitutional liberty, and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-in-

tentioned but mistakenly over-zealous executive officers."

All of which is respectfully submitted in support of the petition, in the earnest hope that the prayer thereof may be granted by this Honorable Court.

IRVING K. BAXTER,
Counsel for Petitioner.

66 Genesee St., Utica, N. Y.

(1988)

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No. 55.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

CESARO SGRO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

IRVING K. BAXTER,
Attorney for Petitioner,
66 Genesee Street,
Utica, N. Y.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 55

CESARO SGRO, PETITIONER

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Summary of Argument

The Brief of Respondent makes two contentions. First, that "The Search Warrant was Executed within the time prescribed by law."

Concededly the Search Warrant was not executed within ten days after its date, as required by statute. The Respondent's contention is merely that it was served within ten days after the date had been changed; and

that "changing the date and reissuing the warrant was, for all intents and purposes, the issuing of a new warrant." But no one had authority to change the date or reissue the warrant. There was neither new information, affidavit, nor complaint made, nor any new finding of probable cause. Therefore, a new warrant could not lawfully have been issued.

The Respondent's second contention is "The Search Warrant issued upon probable cause."

The Search Warrant was issued upon an affidavit by a prohibition agent which alleged a purchase of "a drink of intoxicating liquor, to wit: beer, containing more than one-half of one per cent of alcohol by volume." (R. 4). The petitioner challenges this as being merely a statement of opinion or conclusion of an unqualified witness, and not a statement of facts as required by law to constitute probable cause for issuing a search warrant. The Respondent's brief seeks to meet this challenge by claiming that since Sec. I of Title II of the National Prohibition Act "specifically names 'beer' in defining intoxicating liquor, it was unnecessary for the affiant to further allege that he had tested the beer and had found it to contain a forbidden quantity of alcohol." (Resp. Brief, Page 4). Because the statute defines the term "beer," as therein used, as intoxicating liquor, does not show an affiant qualified to determine that a beverage purchased by him is such "beer" or "intoxicating liquor." Courts take judicial notice that such beverages as whiskey, gin or wine are intoxicating liquor, not because the statute defines them as intoxicating liquor, but because they are so strongly alcoholic as to be unmistakable. But beer and other beverages may or may not have an unlawful alcoholic content. Therefore, courts require legal proof of their unlawful alcoholic content, before finding them to be intoxicating liquor.

The Brief of Respondent does not contend that the agent's affidavit stated facts to constitute probable cause, nor that it showed him to be qualified to give opinion evidence. It contends rather that such statement of facts, or showing of proper qualification to give opinion evidence, is not required for finding of probable cause; and, also, that at the trial the affiant did show expert qualification to give opinion evidence. Even if the agent had shown such expert qualification at the trial, that would not avail toward the support of the search warrant. Sec. 615 U. S. Code, Page 508, provides:

> "Affidavits and depositions.—The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. (June 15, 1917, c. 30, Title XI, Sec. 5, 40 Stat. 228.)"

Argument

The Respondent's brief at page 8 says:

> "Petitioner's contention regarding the proceedings thus shown by the record is that, as the statute (Sec. 11, Title XI, Act of June 15, 1917, *supra*, p. 2) declares that a search warrant which has not been executed within ten days after its date is void, the Commissioner could not lawfully reissue the unexecuted warrant in this case after the lapse of that period."

The Petitioner's main contention on this point is that no one could revive, or lawfully reissue, this void warrant merely by changing its date. That if a second or new search warrant might lawfully be issued at all, it could only be issued upon a new complaint showing "probable cause supported by oath or affirmation" as required by the Fourth Amendment to the Constitution of the United States. Also, the statutory requirements for issuing a search warrant must be met, viz: "The affidavits or

depositions must set forth the facts" and, "If the judge or commissioner is thereupon satisfied * * * he must issue a search warrant * * * commanding him forthwith to search." (Sections 615 & 616, U. S. Code, p. 508.)

The Respondent's brief freely admits that the search warrant had become void because it was not served within ten days after its original date. It neither does nor reasonably could controvert any of the authorities or facts cited in Petitioner's main brief under "Point II." It simply states "We know of no valid reason why the commissioner could not use it (*i. e.,* the void search warrant), as he could a printed blank or form in making out a new warrant" (Resp. Brief, p. 8). But a commissioner could not issue a new warrant without any new affidavit or deposition upon which he might lawfully make a new finding of probable cause. A search warrant is the most drastic weapon known to the law. By it, the privacy of a man's home or his place of business may be invaded by officers of the law and ransacked for evidence to be used against him in criminal prosecution. A strict compliance with the requirements of the Constitution and of the statutes respecting search warrants, is therefore needed to safeguard the rights of citizenship.

The second contention of Respondent's brief, to wit: that the search warrant was issued upon probable cause, seems to be based mostly on the decision in *Johnson v. United States,* 46 F. (2d) 7, which holds:

> "The affidavit and complaint must be read as an entirety and the statements contained therein must be given that reasonable construction which it is obvious was intended by the parties. Construing the allegation of the purchase of 'beer' upon the premises, in connection with the allegations of a thereby resulting violation of the National Prohibition Act, and the averment of the possession upon the premises of intoxicating liquor fit for

> beverage purposes containing more than 1/2 of 1 per cent, etc., we must conclude that the affiant intended to convey the impression of a purchase of 'beer' of a quality which fell within the statutory definition of intoxicating liquor, and that the allegations of the affidavit were sufficient justification for the commissioner's finding of probable cause."

The statements contained in the affidavit apparently were not challenged as being mere conclusions or opinions which the affiant was not shown qualified to give. Perhaps the court's attention was not called to the requirement of the statute that "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." (Sec. 615, U. S. Code, 508.) Nor to such applicable decisions as were cited in Petitioner's brief at page 19, which hold that:

> "The evidence before the Judge or Commissioner who issues the search warrant must be such as would be admissible on trial. *Giles v. United States* (C. C. A.), 284 F. 208, 214. The Commissioner must be furnished with facts—not suspicions, beliefs, or surmises. *Veeder v. U. S.*, 252 F. 414, 164 C. C. A. 338. A mere conclusion is insufficient either in the affidavit or the complaint. *U. S. v. Kaplan* (D. C.), 286 F. 963, 969."

The only other case cited by the Respondent to support the contention of probable cause, is referred to in the opposing brief at page 12, as follows:

> "In *United States v. McGuire,* 300 Fed. 98 (N. D. N. Y.), an affidavit which appears to have merely stated that the affiant purchased 'beer' was held to show probable cause."

This is a decision by the Hon. Frank Cooper, the trial judge in the instant case. The opinion shows that the affidavit not only alleged that the prohibition agent bought beer, but also that the prohibition agent was told

by the bar tender that a beverage which had just been sold to another party in the presence of the agent was "wine." The affidavit did not allege an opinion by the affiant that a beverage sold was wine. It alleged the fact that the bar tender said it was "wine." Courts have frequently taken judicial notice that "wine" is intoxicating liquor.

The next case cited by the opposing brief is *Berry v. U. S.*, 275 Fed. 680 (C. C. A. 7th). As indicated in that brief, this case does not support the Respondent's contention. Instead thereof, it holds:

> "To constitute a violation, the drink would have had to be 'beer' as defined in the act. These government agents were not chemists, attempted no analysis, and established no expert qualifications to measure the alcoholic content of the liquid by drinking it. Their testimony that the liquid was the 'beer' denounced by the act was therefore merely the opinion of unqualified witnesses, and affords no basis for the judgment."

A typical illustration of the unreliability of non-expert opinion is to be found at page 13 of the opposing brief. An ebulliometer is an instrument for measuring the boiling points of liquids (R. 14). It is a rather delicate and expensive instrument, and is not in general use as the opposing brief writer seemed to think. The instrument commonly used to measure the alcoholic content of automobile radiator water is called an hydrometer. It is simply a floating gauge for measuring the specific gravity of liquids. If the opposing brief writer had been an expert in the use of an ebulliometer, he would not have confused it with the hydrometer, or instrument commonly used by automobile owners.

Whether Agent Dodd showed at the trial expert qualification to determine the alcoholic content of beer by use of the ebulliometer; or whether he established at

the trial expert qualification to determine the alcoholic content of beer by tasting it, is entirely immaterial. If the agent had such qualifications, the same should have been shown in his affidavit upon which the search warrant was issued. The failure to show any such expert qualification in the affidavit for search warrant, left his allegations of opinion and conclusion therein contained, incompetent as evidence and worthless as grounds for issuing a search warrant. Evidently the agent's testimony at the trial failed to satisfy the jury that he was an expert or qualified to determine the alcoholic content of beer either by the use of an ebulliometer or by tasting it; as otherwise, the jury would have found the defendant guilty on the charge of sale.

The other six cases cited in Respondent's brief are not in point on the two questions submitted for review. They simply hold that periods of from 12 to 21 days between the time of an offense and the issuance of a search warrant are not unreasonable.

As more fully appears in the brief filed with the petition for certiorari, the search warrant in the instant case was issued without probable cause solely upon the affidavit of a prohibition agent who alleged therein merely his opinion that a beverage he bought was beer having an unlawful alcoholic content. Also, the search warrant was not executed within ten days of its date, and was therefore void by statute. The evidence obtained by service of this void and illegal warrant was the sole basis of the judgment of conviction herein. All of which was in direct violation of the Constitution of the United States. The judgment should therefore be reversed.

Respectfully submitted,

IRVING K. BAXTER,
Attorney for Petitioner,
66 Genesee Street,
Utica, N. Y.

OCTOBER, 1932.

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No. [redacted] 55

In the Supreme Court of the United States

OCTOBER TERM, 1931

CESARO SGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 920

CESARO SGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

A statement by the District Court of its reasons for overruling one of the grounds upon which the validity of the search warrant was challenged will be found at R. 11. Its charge to the jury appears at R. 19–28. The judgment of the District Court was affirmed by the Circuit Court of Appeals *per curiam* without opinion. (R. 40.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 25, 1932. (R. 40–41). A petition for rehearing was denied February 9, 1932. (R. 47.) The petition for certiorari was filed May 6, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the search warrant issued upon probable cause.

2. Whether such warrant was executed within the time prescribed by law.

STATUTE INVOLVED

Section 11, Title XI, of the Act of June 15, 1917, c. 30, 40 Stat. 217, 229, commonly known as the Espionage Act (U. S. C., Title 18, Sec. 621), provides:

> A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

STATEMENT

In a criminal information filed in the District Court for the Northern District of New York the petitioner was charged, in the first count, with having possessed, and in the second count, with having sold, intoxicating liquor in violation of the National Prohibition Act. (R. 3–4.) Prior to trial he moved to suppress the evidence obtained in a search by Federal prohibition officers, pursuant to a search warrant, of premises operated by him as a hotel, on the ground,. among others, that the warrant was invalid because (1) it had issued without probable cause, and (2) it had not been executed within ten days of its issuance, as required by Section 11, Title XI, of the Act of June

15, 1917. (R. 9–15.) The motion was denied. (R. 15.) At the trial the case was submitted to the jury upon a stipulation of facts, subject to petitioner's objection, on the grounds stated in the motion to suppress, to the use of evidence obtained in the search and seizure. (R. 16–19.) The jury found petitioner guilty as charged in the possession count, but disagreed upon the sale count. Petitioner was sentenced to pay a fine of $500. (R. 28.) The judgment was affirmed by the Circuit Court of Appeals. (R. 40.)

ARGUMENT

I

THE SEARCH WARRANT ISSUED UPON PROBABLE CAUSE

The affidavit upon which the search warrant issued was made by one Charles G. Dodd, who was described therein as a United States Internal Revenue Agent, detailed to act as a "Prohibition Enforcement Agent." It contained the following recitals (R. 5–6):

> That on June 29, 1926, deponent personally purchased of a person in charge at said premises, a drink of intoxicating liquor, to wit: beer, containing more than one-half of one per cent. of alcohol by volume, for the sum of $10. That deponent tested the said beer which he took with him and same was found to contain 4.85% of alcohol by volume.

Petitioner asserts that the facts thus stated were insufficient to show probable cause for the issuance

of the warrant because they failed to show that the deponent was qualified to determine that what he had purchased was beer containing more than one-half of one per cent of alcohol by volume. This contention, we submit, is without merit.

An officer, charged with the enforcement of the National Prohibition Act who makes oath that he has tested and determined the alcoholic content of beer, must be understood to assert that he is able to make such tests. Moreover, while the affidavit did not specify the manner in which the test was made, it appears from the court's charge to the jury that Agent Dodd used an ebulliometer and that a Government chemist testified that this was one of the approved methods of determining the alcoholic content of liquids such as beer. (R. 22.) It is a matter of common knowledge, of which the commissioner issuing the warrant could take judicial notice, that with the use of an ebulliometer any person of ordinary intelligence can ascertain with approximate accuracy the percentage of alcohol contained in a fluid. Such instrument is in common use for testing the alcoholic content of the radiators of automobiles during freezing weather.

II

THE SEARCH WARRANT WAS EXECUTED WITHIN THE TIME PRESCRIBED BY LAW

With reference to the time which elapsed between the issuance and execution of the search warrant the following facts were stipulated (R. 17):

> That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by some one in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; * * *

The record also contains the following certificate by the commissioner who issued the warrant (R. 7):

> I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above entitled matter, was made before me on the 6th day of July, 1926. That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or redated, and my docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver.

Petitioner's contention regarding the proceedings thus shown by the record is that, as the statute

(Sec. 11, Title XI, Act of June 15, 1917, *supra*, p. 2) declares that a search warrant which has not been executed within ten days after its date is void, the commissioner could not lawfully reissue the unexecuted warrant in this case after the lapse of that period. (Br. 20–22.)

While it is true that ten days after its original issue the warrant *as so issued* no longer had any legal effect, we know of no valid reason why the commissioner could not use it, as he could a printed blank or form, in making out *a new warrant*. As the new warrant could be based upon the same affidavit and would be identical with the first warrant except for the date, the act of the commissioner in changing the date and reissuing the warrant was, for all intents and purposes, the issuance of a new warrant.

CONCLUSION

The case was correctly decided below. It presents no question worthy of review by this Court. The petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
PAUL D. MILLER,
JOHN J. BYRNE,
W. MARVIN SMITH,
Attorneys.

MAY, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1932

CESARO SCRO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 55

CESARO SGRO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

A statement by the District Court of its reasons for overruling one of the grounds upon which the validity of the search warrant was challenged will be found at R. 6. Its charge to the jury appears at R. 12–17. The judgment of the District Court was affirmed by the Circuit Court of Appeals *per curiam* without opinion. (R. 22.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 25, 1932. (R. 23.) A peti-

tion for rehearing was denied February 9, 1932. (R. 23.) The petition for certiorari was filed May 6, 1932, and was granted May 31, 1932. (R. 24.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the search warrant was executed within the time prescribed by law.

2. Whether such warrant issued upon probable cause.

STATUTE INVOLVED

Section 11, Title XI, of the Act of June 15, 1917, c. 30, 40 Stat. 217, 229, commonly known as the Espionage Act (U. S. C., Title 18, Sec. 621), provides:

> A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

STATEMENT

In an information filed in the District Court for the Northern District of New York the petitioner was charged, in the first count, with having possessed, and in the second count, with having sold, intoxicating liquor in violation of the National Prohibition Act. (R. 2–3.) Prior to trial he moved to suppress the evidence obtained in a search

by Federal prohibition officers, pursuant to a search warrant, of premises operated by him as a hotel, on the grounds, among others, that the warrant was invalid because (1) it had not been executed within ten days of its issuance, as required by Section 11, Title XI, of the Act of June 15, 1917, and (2) it had issued without probable cause. (R. 5–9.) The motion was denied. (R. 9.) At the trial the case was submitted to the jury upon a stipulation of facts, subject to petitioner's objection on the grounds stated in the motion to suppress to the use of evidence obtained in the search and seizure. (R. 9–11.) The jury found petitioner guilty as charged in the possession count, but disagreed upon the sale count. Petitioner was sentenced to pay a fine of $500. (R. 17.) The judgment was affirmed by the Circuit Court of Appeals. (R. 23.) This Court granted a writ of certiorari. (R. 24.)

SUMMARY OF ARGUMENT

While it is true that under Section 11, Title XI, of the Espionage Act the failure to execute a search warrant within ten days of its date renders the warrant invalid, we submit that the statute did not preclude the Commissioner from using the first warrant in this case, as he could a printed blank or form, in issuing a *new warrant*. The new warrant would be based upon the same affidavit and would be identical with the first warrant except for the date. The act of the Commissioner in

changing the date and re-issuing the warrant was, for all intents and purposes, the issuing of a new warrant.

The affidavit of Prohibition Agent Dodd alleged a purchase of beer containing more than one-half of one per cent of alcohol by volume. In view of Section 1, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 307 (U. S. C., Title 27, Sec. 4), which specifically names "beer" in defining intoxicating liquor, it was unnecessary for the affiant to further allege that he had tested the beer and had found it to contain a forbidden quantity of alcohol. *Johnson* v. *United States,* 46 F. (2d) 7 (C. C. A. 6th); *United States* v. *McGuire,* 300 Fed 98 (N. D. N. Y.). This allegation may therefore be rejected as surplusage. But assuming that it may not be eliminated, we submit that there is no merit in petitioner's contention that the affidavit did not show probable cause for the issuance of the warrant because it failed to show that the agent who purchased and tested the beer was qualified to make such test. This contention is based upon the assumption that to determine the alcoholic content of beer requires a knowledge, training, or experience not possessed by one having only the qualifications of a prohibition enforcement agent. It is a matter of common knowledge that with the use of an instrument known as an ebulliometer any person of ordinary intelligence can ascertain with approximate accuracy the percentage of alcohol in a fluid. The ebulliometer is in general use for testing the alcoholic

content of the radiators of automobiles in freezing weather and requires no more skill in its use than does the gauge commonly used by automobile owners for testing the air pressure of the tires on their cars. Although the manner in which the agent tested the beer is not stated in the affidavit, it appears in the court's charge to the jury that he used an ebulliometer and that a government chemist testified that this was one of the approved methods of determining the alcoholic content of liquor such as beer. It also appears from the court's charge that the agent testified at the trial that he tasted the beer he had purchased, that he was familiar with the taste of beer having percentages of alcoholic content of two and one-half per cent or more and that the beer in question had such an alcoholic content.

Assuming that the affidavit upon which the original warrant issued showed probable cause and that Section 11 of the Espionage Act did not prevent the issuance and execution of the new warrant, the only question which could arise respecting the validity of that warrant would be whether probable cause ceased to exist because of the lapse of twenty-one days before the new warrant issued. The limitation prescribed by Section 11 of ten days within which a warrant must be executed after its issuance was designed to prevent undue delay in the execution of the warrant and to require, after the expiration of the statutory period, a new warrant based upon a new finding by a judge or Commis-

sioner that probable cause then existed in order to justify a search. That limitation was not intended to prescribe ten days as the maximum period within which the condition shown by the affidavit as justifying a search could be presumed to continue. It has been so held, in effect, in a number of cases, cited *infra* pp. 15–17, involving periods ranging from twelve to twenty-one days. No hard and fast rule can be applied in determining whether an unreasonable length of time has elapsed between the event or events relied upon to show probable cause and the making of the affidavit or the issuance and execution of the search warrant. Each case must depend upon its own peculiar facts. The affidavit in the instant case alleged the purchase of beer in a hotel from the person in charge on June 29, 1926. We submit that if this showed probable cause for belief that intoxicating liquor was possessed on the premises on July 6, 1926, when the original warrant issued, it would not be unreasonable to infer that liquor was possessed there three weeks later when the new warrant issued.

ARGUMENT

I

THE SEARCH WARRANT WAS EXECUTED WITHIN THE TIME PRESCRIBED BY LAW

With reference to the time which elapsed between the issuance and execution of the search warrant the following facts were stipulated (R. 10):

> That on or about the sixth day of July, 1926, William Arthur, United States Commissioner at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by some one in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; * * *

The record also contains the following certificate by the Commissioner who issued the warrant (R. 4):

> I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above-entitled matter, was made before me on the 6th day of July, 1926. That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or redated, and my docket book shows that same was reissued on the 27th

day of July, 1926, and mailed back to said Vandiver.

Petitioner's contention regarding the proceedings thus shown by the record is that, as the statute (Sec. 11, Title XI, Act of June 15, 1917, *supra*, p. 2) declares that a search warrant which has not been executed within ten days after its date is void, the Commissioner could not lawfully reissue the unexecuted warrant in this case after the lapse of that period.

While it is true that upon the expiration of ten days after its original issue the warrant *as so issued* no longer had any legal effect (*Appell* v. *United States*, 29 F. (2d) 279, 280 (C. C. A. 5th)), we know of no valid reason why the Commissioner could not use it, as he could a printed blank or form, in making out a *new warrant*. As the new warrant would be based upon the same affidavit and would be identical with the first warrant except for the date, the act of the Commissioner in changing the date and reissuing the warrant, was, for all intents and purposes, the issuance of a new warrant.

II

THE SEARCH WARRANT ISSUED UPON PROBABLE CAUSE

The affidavit upon which the search warrant issued was made by one Charles G. Dodd, who was described therein as a "United States Internal Revenue Agent, detailed to act as Prohibition En-

forcement Agent." It contained the following recitals (R. 3–4):

> That he believes the laws of the United States, viz: the National Prohibition Act, are being violated by reason of the facts, to wit: that intoxicating liquors, containing more than one-half of one per cent of alcohol by volume, are being unlawfully possessed for the purpose of sale and distribution, at the premises known as a 2½-story frame hotel on northerly side of main highway leading from Pine Woods to Madison. Said hotel in Bouckville, N. Y., owned and operated by John Doe in said Village of Bouckville, N. Y., and District as aforesaid.
>
> That the grounds of this application and the sources of deponent's said belief are the following facts and circumstances: That on June 29, 1926, deponent personally purchased of a person in charge at said premises, a drink of intoxicating liquor, to wit: beer, containing more than one-half of one per cent of alcohol by volume, for the sum of $.10. That deponent tested the said beer which he took with him and same was found to contain 4.85% of alcohol by volume.
>
> That from the foregoing, deponent has reason to believe and does believe that intoxicating liquors are being possessed on said premises for the purpose of unlawful sale and distribution contrary to the provisions of the National Prohibition Act and against the peace and dignity of the United States of America.

Petitioner asserts that the facts stated in this affidavit were insufficient to show probable cause for the issuance of the warrant because they failed to show that the affiant was qualified to determine that what he had purchased was beer containing more than one-half of one per cent of alcohol by volume.

We believe that it was unnecessary for the affiant to allege that he tested the beer purchased and found that it contained more alcohol than that permitted by law, and that the affidavit may stand without that allegation. Eliminating it, the affidavit is similar to that involved in *Johnson* v. *United States,* 46 F. (2d) 7, in which the Circuit Court of Appeals for the Sixth Circuit held (pp. 8–9):

> It is conceded by appellant that proof of a sale of "whiskey," "wine," "gin," or other of the familiar intoxicants, none of which has ever been known to exist without more than the permissible maximum of alcoholic content, may properly be held to establish a sale forbidden under the National Prohibition Act. Courts will take judicial notice of the intoxicating quality of these beverages although described only by name. Cf. *Albert* v. *U. S.,* 281 F. 511 (C. C. A. 6); *U. S.* v. *Edwards,* 296 F. 512 (D. C. Mich.); *In re Hollywood Cabaret,* 5 F. (2d) 651 (C. C. A. 2); *Fry* v. *U. S.,* 9 F. (2d) 38 (C. C. A. 9); *Weeke* v. *U. S.,* 14 F. (2d) 398 (C. C. A. 8); *Allshouse* v. *U. S.,* 38 F. (2d) 234 (C. C. A. 3);

U. S. v. *Barbini,* 26 F. (2d) 237 (D. C. Cal.); *U. S.* v. *Ghiorsi,* 31 F. (2d) 440 (D. C. Cal.). But it is said that this doctrine does not apply to "beer," citing *Keen* v. *U. S.,* 11 F. (2d) 260 (C. C. A. 8), *Proulx* v. *U. S.,* 32 F. (2d) 760 (C. C. A. 1). The two last-cited cases do hold that the intoxicating nature of a beverage styled "home-brew beer" is not to be inferred from the name alone, notwithstanding the fact that beer is specifically named along with alcohol, brandy, whisky, rum, gin, ale, porter, and wine, in section 1, title 2, of the National Prohibition Act (27 USCA § 4), defining intoxicating liquor. Both cases, however, seem to indicate the opinion that the allegation of a sale of "lager beer," or even "beer without any adjectival modification," would be enough. Whether that may or may not be so as an academic question, we do not deem it necessary to decide. Having alleged the purchase of "beer" in the affidavit and complaint for search warrant, the affiant further avers that "because of the above facts" the National Prohibition Act is being violated in the premises named, and that "on his own knowledge" there then was, upon the premises named, "a certain quantity of intoxicating liquor fit for beverage purposes and containing more than ½ of 1% of alcohol by volume unlawfully acquired, possessed, stored and used in connection with the aforesaid violation of the National Prohibition Act." The affidavit and complaint must be

> read as an entirety and the statements contained therein must be given that reasonable construction which it is obvious was intended by the parties. Construing the allegation of the purchase of "beer" upon the premises, in connection with the allegations of a thereby resulting violation of the National Prohibition Act, and the averment of the possession upon the premises of intoxicating liquor fit for beverage purposes containing more than ½ of 1 per cent, etc., we must conclude that the affiant intended to convey the impression of a purchase of "beer" of a quality which fell within the statutory definition of intoxicating liquor, and that the allegations of the affidavit were sufficient justification for the commissioner's finding of probable cause.

In *United States* v. *McGuire,* 300 Fed. 98 (N. D. N. Y.), an affidavit which appears to have merely stated that the affiant purchased "beer" was held to show probable cause. There is nothing in the opinion to indicate that there was any allegation in the affidavit that the beer contained more than the permitted quantity of alcohol.

See, however, *Berry* v. *United States,* 275 Fed. 680 (C. C. A. 7th).

But even if the allegation of the affidavit which petitioner questions may not be disregarded as surplusage, we submit that his contention is without merit. It is based upon the assumption that one having only the qualifications of an officer charged with the enforcement of the National Prohibition Act would not possess the necessary knowledge,

training, or experience to ascertain the alcoholic content of beer. It is, however, a matter of common knowledge, of which the Commissioner issuing the warrant could take judicial notice, that with the use of an instrument known as an ebulliometer any person of ordinary intelligence can ascertain with approximate accuracy the percentage of alcohol in a fluid. Such instrument is in general use by automobile owners for testing the alcoholic content of the radiators of their cars in freezing weather and requires no more skill to operate than does the gauge commonly used by such owners for testing the air pressure in the tires of their automobiles. While Agent Dodd's affidavit did not specify the manner in which he tested the beer, it appears from the court's charge to the jury that he used an ebulliometer and that a Government chemist testified that this was one of the approved methods of determining the alcoholic contents of liquors such as beer. (R. 13–14.) There is nothing in the record to support petitioner's assertions that the agent misconceived certain elementary principles of chemistry in applying this test.

It also appears from the court's charge to the jury (R. 13) that the prohibition agent tasted the beer he had purchased, that he was familiar with the taste of beer having an alcoholic content of two and one-half per cent or more, and that the beer in question had such an alcoholic content.

We submit that the premise upon which petitioner's argument rests is untenable; that the Commissioner was fully justified in treating Agent Dodd's affidavit as showing that the beer purchased by him contained in excess of the lawful quantity of alcohol, and that the affidavit accordingly stated facts within the knowledge of the affiant which were ample to show probable cause for the issuance of a warrant.

Assuming that the original warrant issued upon probable cause and that Section 11 of the Espionage Act (*supra*, p. 2) did not prevent the issuance and execution of the new warrant, the only doubt which can arise respecting the validity of the new warrant would be whether probable cause had ceased to exist because a period of twenty-one days elapsed between the issuance of the old and the new warrant.[1]

This question is unaffected by the requirement of Section 11 of the Espionage Act that the warrant must be executed within ten days after its issue. This was obviously designed to prevent undue delay in the execution of the warrant and to require, after the expiration of the statutory period,

[1] This question was raised in the trial court on the motion to suppress (R. 7) and is probably sufficiently preserved by the first specification of the assignments of error filed in that court (R. 18–19). While the point was not discussed in the petition for certiorari, we have considered it because of the rule of this Court that it may, at its option, consider a plain error not assigned or specified. (Rule 27.)

a new warrant based upon a new finding by a judge or commissioner that probable cause then existed in order to justify a search. But it has been often held, in effect, that Congress did not intend by this provision to prescribe ten days as the maximum period during which the condition shown by the affidavit as justifying a search could be presumed to continue. Thus, in *United States* v. *McKay*, 2 F. (2d) 257 (Nev.), where an affidavit for a search warrant made twelve days after liquor was alleged to have been sold on the premises was held to show probable cause, the court, in referring to the limitation of Section 11, said (p. 259):

> The absence of such a limitation as to the lapse of time between the purchase of liquor and the making of an affidavit indicates that in the opinion of the Congress this was a matter which should be left to the discretion of the judge or commissioner, who determines whether there is or is not probable cause. There can be no hard and fast rule fixed by courts to fit every such situation, under all circumstances. Each case must depend upon its own facts. The person or persons who are charged with having whisky in their possession, the quantity of liquor, and the place where it is kept, may all be taken into account, as well as the alleged sale, and the lapse of time.

In *United States* v. *Fitzmaurice*, 45 F. (2d) 133, the Circuit Court of Appeals for the Second Circuit, in connection with a period of nineteen days

between the date the liquor referred to in the affidavit was sold and the date the search warrant was executed, said (p. 134):

> We agree that the whisky originally on hand had probably been drunk; if the property to be seized, which the warrant is to "specify" (sections 616, 626, title 18, U. S. Code) must be the identical liquor possessed at the time of the search, the entry was unlawful. We all know, however, that purveyors of liquor replenish their stocks, and it was a fair inference that whoever was maintaining this saloon, would do the same, and that there would be whisky on the premises on December thirteenth, as there had been on November twenty-fourth, though not the same.

In *United States* v. *Callahan,* 17 F. (2d) 937 (M. D. Pa.), the court held that probable cause for the issuance of a search warrant was shown even though thirteen days had passed since the making of the affidavit, citing *Hawker* v. *Queck,* 1 F. (2d) 77 (C. C. A. 3d), certiorari denied, 266 U. S. 621, where a lapse of twenty-one days between the sale which was the basis of the affidavit for a warrant and the issuance of the warrant was held not to affect the validity of the warrant.

A similar period of twenty-one days between the sale of liquor and the issuance of a search warrant was held not to destroy probable cause in *Hefferman* v. *United States,* 50 F. (2d) 554 (C. C. A. 3d).

In *Dandrea* v. *United States*, 7 F. (2d) 861 (C. C. A. 8th), a search warrant was held invalid where a period of forty-three days had elapsed between the purchase of liquor and the making of the affidavit, but the court pointed out that—

> The affidavit does not state that the John Doe, from whom the whisky was said to have been purchased, was the owner or proprietor of the place, or even an employee in charge.

In the instant case the affidavit alleged the purchase of beer in a hotel from the person in charge on June 29, 1926. Assuming that this showed probable cause for belief that intoxicating liquor was possessed on the premises on July 6, 1926, when the original warrant issued, we submit that it would not be unreasonable to infer that liquor was possessed there three weeks later, when the new warrant issued.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
W. MARVIN SMITH,
Attorneys.

SEPTEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

ADDENDUM

No. 55, October Term, 1932

Cesaro Sgro, petitioner

v.

United States

The statement on page 13 of our brief, with reference to the use of the ebulliometer, that:

> Such instrument is in general use by automobile owners for testing the alcoholic content of the radiators of their cars in freezing weather and requires no more skill to operate than does the gauge commonly used by such owners for testing the air pressure in the tires of their automobiles,

was induced, as petitioner in his reply brief surmises, by our having confused the ebulliometer with the hydrometer, both of which instruments are in common use for testing the alcoholic content of fluids. While the statement quoted is inapplicable to the ebulliometer, the erroneous use of the illustration therein given does not affect our argument that a Federal prohibition agent need not possess any special qualification to be able, with the use of an ebulliometer, to ascertain the alcoholic content of beer. The function of the ebulliometer and the

method of using it are thus described in *Clift* v. *United States*, 22 F. (2d) 549, 550 (C. C. A. 6th):

> This is merely a convenient vessel for boiling a liquid. By using it and a specially graduated thermometer, he (the prohibition officer) obtained the boiling temperature, first of water, and then, under the same conditions, of the liquid being tested. The differences in the boiling temperatures, indicating differences in specific gravity, were then translated into percentage of alcohol. This was done by reference to a table or chart purporting merely to state and formulate the scientific knowledge on this subject. We understand the evidence to be that this chart, along with the instrument and the thermometer, were furnished to the witness by the prohibition department and are in general use throughout the country by the representatives of the department for such tests—in other words, that they constitute a commonly recognized standard. * * *

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
W. MARVIN SMITH,
Attorneys.

OCTOBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 55.—October Term, 1932.

Cesaro Sgro, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The petitioner was charged with violating the National Prohibition Act by possessing and selling intoxicating liquor at the Bouckville Hotel. The District Court denied his request to restrain the use of evidence procured by federal officers while searching the hotel under a warrant alleged to be invalid. This evidence was introduced at the trial over his objection. He was found guilty and the judgment against him was affirmed by the Circuit Court of Appeals. This Court granted certiorari. The only question presented is as to the validity of the warrant.

Subject to petitioner's contention, the parties entered into a stipulation of facts which so far as pertinent to the question is as follows:

"That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him or by someone in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; that acting under the color of such search warrant", the search in question was made.

The record also contains a certificate by the United States Commissioner, under date of December 20, 1926, as follows:

"I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above entitled matter was made before me on the 6th day of July, 1926. That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or redated, and my docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver".

The National Prohibition Act, Section 25, 41 Stat. 305, 315, U. S. C., Tit. 27, sec. 39, authorizes the issue of warrants to search for intoxicating liquors as provided in Title XI of the Act of June 15, 1917, 40 Stat. 228.[1] Section 11 of the last mentioned Act has the following requirement:

"Sec. 11. A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void".

As the original warrant was issued on July sixth and was not executed within ten days, it became void under this explicit pro-

[1]The following are among the provisions of the Act of June 15, 1917, Tit. XI, 40 Stat. 228:

"Sec. 3. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

"Sec. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"Sec. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"Sec. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner".

vision. But the Government contends that the warrant could be redated and reissued, and that in this form it should be regarded as a new warrant under which the search could lawfully be made.

With this argument we cannot agree. The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual. *Boyd* v. *United States*, 116 U. S. 616, 635; *Byars* v. *United States*, 273 U. S. 28, 32; *Marron* v. *United States*, 275 U. S. 192, 196, 197; *United States* v. *Lefkowitz*, 285 U. S. 452, 464. The statute requires that the judge or commissioner issuing a search warrant for intoxicating liquors must be satisfied "of the existence of the grounds of the application or that there is probable cause to believe their existence". Act of June 15, 1917, Tit. XI, sec. 6. He must take proof to that end. *Id.*, secs. 4, 5. The warrant must state "the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof." *Id.*, sec. 6. While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case. It is in the light of the requirement that probable cause must properly appear when the warrant issues that we must read the provision which in explicit terms makes a warrant void unless executed within ten days after its date. That period marks the permitted duration of the proceeding in which the warrant is issued. There is no provision which authorizes the commissioner to extend its life or to revive it.

The issue of a second warrant is essentially a new proceeding which must have adequate support. The fact that it is a second warrant gives the commissioner no privilege to dispense with the statutory conditions. These cannot be escaped by describing the action as a reissue. If the warrant is the old one, sought to be revived, the proceeding is a nullity, and if it is a new warrant, the commissioner must act accordingly. The statute in terms requires him before issuing the warrant to take proof of probable cause. This he must do by examining on oath the complainant

and his witness and requiring their affidavits or depositions. The proof supplied must have appropriate relation to the application for the new warrant and must speak as of the time of the issue of that warrant. The commissioner has no authority to rely on affidavits which have sole relation to a different time and have not been brought down to date or supplemented so that they can be deemed to disclose grounds existing when the new warrant is issued. The new warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture. The purpose of the statute would be thwarted if by the simple expedient of redating, without more, the time for the execution of a warrant could be extended.

Applying these principles to the instant case, the warrant cannot be sustained. The proceeding for the warrant issued on July sixth had terminated and that warrant was dead. On the new application of July twenty-seventh the commissioner took no proof to show that probable cause then existed and he made no finding of probable cause at that time. It is impossible by any process of reasoning to obscure or alter what he actually did. He simply changed the date of the old warrant and it was "thus reissued". Such action was unauthorized.

Judgment reversed.

Mr. Justice STONE and Mr. Justice CARDOZO think that the Commissioner, by redating the warrant, in effect, issued a new warrant, which was adequately supported by facts disclosed in the affidavit, then before him, on which the first warrant had been issued.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 55.—October Term, 1932.

Cesaro Sgro, Petitioner, *vs.* The United States of America	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1932.]

The separate opinion of Mr. Justice McReynolds.

I concur in the conclusion that the judgment below should be reversed.

An information charged that Petitioner Sgro had violated the National Prohibition Act by keeping intoxicating liquor at an hotel. In due time and manner he unsuccessfully asked the District Court to prohibit the use of all evidence procured by federal officers while searching the hotel under color of a warrant alleged to be invalid. At the trial this evidence was introduced over his objection. A verdict of guilty followed; judgment thereon was affirmed by the Circuit Court of Appeals. If the challenged search warrant was invalid, this judgment must be reversed.

By stipulation it appears—

> "That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by someone in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh,

1926, and thus reissued; that acting under the color of such search warrant, Prohibition Agents Henry E. March, Bernard J. Dwyer and B. G. Silvermail went to the premises described in the search warrant, namely the Bouckville Hotel, of which the defendant is the proprietor, at Bouckville, New York, in the Northern District of New York, and there, the defendant being present, searched the premises and found one pint of gin, a pint of beer in the bar room of the said premises, and also found in the cellar of said premises under said bar room three and a half barrels of liquid, ..."

The Fourth Amendment provides—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The National Prohibition Act, Sec. 25, 41 Stat. 305, 315, U. S. C. A., Title 27, Sec. 39, authorizes the issuance of warrants to search for intoxicating liquors under the circumstances specified by Title 11, Public Laws No. 24, 65th Congress (Espionage Act), approved June 15, 1917, 40 Stat. 228. The following are among the provisions of the latter Act—

"Sec. 2. A search warrant may be issued under this title upon either of the following grounds:

"3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed.

"Sec. 3. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

"Sec. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"Sec. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"Sec. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

"Sec. 11 A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void."

Counsel for the United States submit that while under the Espionage Act (Section 11) a search warrant not executed within ten days becomes invalid, the statute does not inhibit utilization of an outlawed warrant as a mere form or blank when preparing a new one based upon the original affidavit; that here the act of the Commissioner in changing the date upon the July sixth warrant and then reissuing it under date of July twenty-seventh was to all intents and purposes the issuing of an entirely new and valid warrant supported by the Dodd affidavit of July sixth. This argument is pertinent and should be answered.

It fairly may be assumed that the Commissioner who issued the warrant on July twenty-seventh relied upon the original (July sixth) affidavit which remained before him; and if this was permissible, the new warrant, of course, was good—just as good as if no earlier one had been issued upon the same affidavit. But if the original affidavit had become stale by the passage of time, then the new warrant lacked adequate support and was invalid. Manifestly, it is important that there should be some definite rule by which to determine when such an affidavit is impotent; otherwise, the matter is left at large—dependent upon varying views of reasonableness.

The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating such process, should be liberally construed in favor of the individual. *Boyd* v. *United States,* 116 U. S. 616, 635; *Adams* v. *New York,* 192 U. S. 585; *Byars* v. *United States,* 273 U. S. 28; *Marron* v. *United States,* 275 U. S. 192, 196, 197.

The statutes require that a warrant to search for intoxicating liquors shall rest upon duly established probable cause to believe that at the time it issues the liquor is unlawfully possessed. The supporting affidavit must relate to facts which tend to show an unlawful situation actually or probably existing at the moment. Section 11, Espionage Act, declares that after ten days a warrant not fully executed shall be void. That is the prescribed period during which the circumstances existing when it issued can be supposed to continue.

Considering the whole statute, and especially the evident purpose of Congress to protect against unnecessary delays and uncertainties, I think no search warrant should issue upon an affidavit more than ten days old. After attaining that age statements therein cannot properly indicate presently existing conditions. In practice the contrary view would permit results which the prescribed ten days' limitation was intended to prevent. The disclosed unlawful situation is not presumed to continue more than ten days after a warrant issues and it seems entirely reasonable to conclude that Congress did not intend to sanction a less rigid limitation upon the supporting affidavit.

It follows that the Commissioner's warrant of July twenty-seventh was invalid, even if it be assumed that he then actually relied upon the original supporting affidavit dated three weeks earlier.

Reversed.